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In the Supreme Court
of the United States

OCTOBER TERM 1972

No. 72-1288

UNITED PACIFIC INSURANCE COMPANY,
Petitioner,

v.

DISCOUNT COMPANY, INC., a corporation, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, ELIM E. NORELIUS, and AGNES NORELIUS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above entitled case (entitled below, *U.S.A. for the use of Stanton W. Payne, Plaintiff* v. *United Pacific Insurance Company, a Washington corporation, Defendant and Third-Party Plaintiff — Appellee* v. *Discount Company, Inc., a corporation, Richard R. Norelius, Phyllis L. Norelius, Elim E. Norelius, and Agnes Norelius, Third-Party Defendants — Appellants and*

Earl Angell, Third-Party Defendant — Appellee) which reversed in part and remanded to the District Court the decree of the District Court awarding Petitioner full indemnity against Respondents under a single indemnity agreement.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A. The opinion denying the Petition for Rehearing is printed in Appendix B. The opinion of Senior Judge Solomon of the United States District Court for the District of Oregon is printed in Appendix C.

JURISDICTION

The judgment and opinion of the Court of Appeals was dated and entered January 5, 1973. A timely Petition for Rehearing was denied by order dated and entered February 20, 1973 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where a federal district court admittedly has equitable jurisdiction over a third-party claim for partial indemnity under a single indemnity agreement, does ancillary jurisdiction extend to granting full indemnity under a single cause of action for specific enforcement of that indemnity agreement?

2. When a third-party plaintiff has a single ripe cause of action for full indemnity under a single indemnity agreement with third-party defendants, does ancillary jurisdiction extend only to partial indemnity in the amount of the original claim of plaintiff against defendant—third-party plaintiff, thereby requiring third-party plaintiff to split his cause of action and file separate lawsuits to obtain full indemnity?

3. Has the Court of Appeals for the Ninth Circuit limited ancillary jurisdiction in irreconcilable conflict with the holdings of the Courts of Appeals for the Third, Fourth, and Seventh Circuits?

4. Has the Court of Appeals for the Ninth Circuit limited federal court jurisdictional concepts of "judicial economy, convenience and fairness to litigants" in conflict with the decisions of the United States Supreme Court and of the First and Second Circuits?

STATUTES INVOLVED

This case involves the extent of ancillary jurisdiction of the federal courts to entertain third-party claims, where jurisdiction over the primary claim is properly invoked (in this case under the Miller Act, 40 U.S.C. § 270(b)), and the occasion for exercise of that ancillary jurisdiction applying Rules 14(a), 18(a), and 18(b) of the Federal Rules of Civil Procedure.

"Rule 14(a) **When Defendant may Bring in Third Party.** At any time after commencement of

the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

"Rule 18(a) **Joinder of Claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

"Rule 18(b). **Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the partes. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

STATEMENT OF THE CASE

On August 8, 1967, Respondents Discount Company and its President and his wife, Richard R. Norelius and Phyllis L. Norelius, entered into a general indemnity agreement with Petitioner, United Pacific Insurance Company (hereinafter called "United"). Pursuant to the indemnity agreement United posted Miller Act bonds for two contracts which Discount entered into with the United States Forest Service (Waldo Lake Project and Mona Campground Project).

In the summer of 1969, Discount having completed neither project, disputes arose between Discount and the Forest Service on the scope and progress of the work. Various unpaid claimants presented claims and in June, 1969 Payne filed his Miller Act complaint against United to which Discounts' attorney, on behalf of United, filed a general denial. In July and August, 1969, the Forest Service terminated for default by Discount the contracts on both projects. As required by its Miller Act bonds, United undertook to complete the work on the projects and began to receive and pay various claims. On September 2, 1969, United established reserves under its general indemnity agreement in the amount of $111,500, its then anticipated losses in completing the projects and paying claims. United demanded that Discount and the Noreliuses immediately post collateral security in accordance with the indemnity agreement. Upon learning that Discount and Noreliuses were transferring and concealing assets to avoid the demand for collateral, United, on September 15, 1969, took over defense of the Payne claim and impleaded Discount and the Noreliuses as third-party defendants. United in its third-party complaint asserted a single cause of action for specific performance of the indemnity agreement invoking established equity procedures recognized and sanctioned by the Ninth Circuit, applying Oregon law. *Milwaukie Construction Company* v. *Glens Falls Insurance Co.*, 367 F.2d 964 (9th Cir., 1966). This suit for specific enforcement and other immediate equitable relief applied not only to amounts necessary to insure partial indemnity for the Payne

claim alone, but also to secure full indemnity for the reserves already established by United. Specific enforcement and injunction against fraudulent conveyances and concealment of assets by nature could not be piecemeal.

Because of the continuing fraudulent conveyances and other improper conduct of the indemnitors, a show cause hearing was held before the District Court on October 13, 1969. At that time, the third-party indemnitors stipulated to the entry of a preliminary mandatory and restraining injunction, a copy of which stipulation is set forth as Appendix D. The District Court approved the stipulation and entered a mandatory and restraining injunction in accordance with the stipulation.

Despite the stipulated entry of the preliminary mandatory and restraining injunction, specifically enforcing the indemnity agreement, Indemnitors Discount and Richard R. Norelius "continued to transfer and conceal his assets" (infra, p. C10), including ownership of a home in Astoria in the name of his parents, Elim Norelius and Agnes Norelius. To give the District Court power to effectuate its injunction (in whatever amount was properly within the jurisdiction of the court) Elim Norelius and Agnes Norelius were made additional third-party defendants on December 5, 1969, so that the court would be able effectively to impose a constructive trust on the house (or the proceeds from the sale, if any) as part of the equitable relief of specific enforcement of the indemnity agreement and injunction against continued fraudulent conveyances and concealment of assets.

For a number of reasons, including the fact that Respondents had three successive different attorneys, the case did not come to trial before the District Court until February 2-3, 1971. During the pendency of the case in the District Court, United settled Payne's claim for $2,162.40 and completed both of Discount's projects, resulting in a total excess of expenditures for completion of the projects and payment of the bills in excess of receipts at the time of trial in an amount of $145,777.67, which amount was an Agreed Fact in the Pre-Trial Order.

Also, during the pendency of the *Payne* claim, another Miller Act case was brought against United in the United States District Court for the District of Oregon by another Discount subcontractor to recover over $13,000. *U.S.A. for the use of Richard C. Hope* v. *United Pac., Civ. No.* 69-581. Because of the stipulated injunction and pursuing of its claim for full indemnity in *Payne*, United did not implead Discount and the Noreliuses in the *Hope* case. On January 28, 1971, Judge Goodwin found against Hope. Hope's attempts to recover from United were aided by Norelius, who, Judge Solomon found, had already received a $5,075 kickback from Hope out of a prior Hope claim which Norelius asked United to pay and which United had paid.

Respondents did not raise any issue as to the District Court's jurisdiction over the third-party complaint for full indemnity until they filed a motion in September, 1970, one year after the third-party complaint was filed, after the stipulated mandatory and

restraining injunction of October 13, 1969 and after substantial pre-trial proceedings had been accomplished. The motion was denied by District (now Circuit) Judge Alfred T. Goodwin on September 14, 1970 and again at trial by Senior Judge Gus J. Solomon.

Because of the fraudulent conveyances and concealment and further because of the existence of other circumstances which justified specific performance, the court assumed equitable jurisdiction, specifically enforced the indemnity agreement and imposed a trust on the Astoria house in order to effectuate its decree of specific enforcement and mandatory and restraining injunction.

Respondents' contentions in the Pre-Trial Order covered twenty-one pages. Essentially, Respondents claimed that United was totally estopped and otherwise equitably precluded by its conduct and activities from enforcing the indemnity agreement against Respondents for *any* relief in *any* amount. Undoubtedly because the indemnitors raised all of these issues as to United's right to any indemnity whatsoever against Respondents, the Ninth Circuit was led to state in its decision, "we realize that to decide the liability-over issue and establish Discount's and the Noreliuses' liability for the Payne claim required the district court to consider many of the same issues involved in United's claim for $145,000." (infra, p. A6). The *amount* of full indemnity was not, of course, an issue at all, because it was an Agreed Fact.

In their appeal to the Ninth Circuit, Respondents raised two claims of error:

1. The District Court lacked jurisdiction to consider United's claim for indemnity in any amount greater than the claim of Payne in the original action.

2. The District Court erred in assuming equitable jurisdiction, thereby denying Respondents a jury trial.

The Court of Appeals rejected Respondents' second ground of appeal, thereby affirming the District Court's assumption of equitable jurisdiction. On the first ground of appeal, the court held the District Court lacked jurisdiction over United's third-party claim "in excess of its claim for [partial] indemnification for Payne's claim" and therefore vacated "that part of the judgment attributable to more than Payne's claim and costs and attorneys' fees allocable thereto" (infra, p. A7).

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit decision is in direct and irreconcilable conflict with decisions of the Third, Fourth and Seventh Circuits.

The judgment of the Ninth Circuit reverses a ruling first made by the District Court on September 14, 1970, by District (now Circuit) Judge Alfred T. Goodwin and the same ruling again made by Senior Judge Gus J. Solomon at trial. The issue concerning

United's third-party claim for total indemnity was not raised by Respondents until approximately one year after the third-party claim had been filed, after substantial discovery and pre-trial proceedings had taken place.

The Ninth Circuit decision acknowledged that "the district court properly asserted jurisdiction over United's claim for indemnification as to Payne's claim." But, continued the Ninth Circuit,

> "We reject the suggestion that a federal court can assume jurisdiction over a claim for total indemnification merely because it is ancillary to a proper ancillary claim for liability-over." [i.e. partial indemnity] (infra, p. A6-7).

The Ninth Circuit ruling is in direct conflict with the holding of the Seventh Circuit in *Ruckman and Hansen, Inc.* v. *Contracting and Material Co.*, 328 F.2d 744 (7th Cir. 1964). Although the *Ruckman and Hansen* case was called to the attention of the Ninth Circuit, the decision of the Ninth Circuit ignores the case entirely, failing to cite it, and either to distinguish it or to disagree with it. In *Ruckman and Hansen*, while the case was pending, a consent judgment was entered in favor of plaintiff against defendant on the original claim in the amount of $19,431.92. Subsequent to the entry of that judgment, defendant-third-party plaintiff amended its third-party complaint to seek recovery against third-party defendants of 1) specificially plaintiff's claim of $19,431.92 included in the consent judgment; 2) additional amounts totalling $10,307.43 paid in connection with the dis-

charge of other claims and unpaid bills for which it sought indemnity; and 3) the amounts claimed in a pending lawsuit against third-party plaintiff with respect to still another claim (later settled for $500).

The predicate of the third-party complaint was an agreement of indemnity (the rights to which third-party plaintiff had become subrogated) under which third-party plaintiff was to be secured against *all loss, costs, damage or expense* incurred by reason of a subcontract, of which original plaintiff's claim was only a part. The District Court viewed the agreement of indemnity as a set of operative facts and recognized third-party plaintiff's right to total indemnification. The Seventh Circuit held that:

> "[a]ll of these items of damages 'arose out of the conduct, transaction or occurrence set forth . . . in the original pleading' and therefore relate back to the original third-party complaint under the express provisions of Rule 15(c) of the Federal Rules of Civil Procedure."

Third-party defendant, on appeal, argued that Rule 14(a) precluded recovery of the additional payments alleged in the amended third-party complaint, *specifically because they were not part of the original liability of defendant-third-party plaintiff to plaintiff on the original complaint.* The Seventh Circuit rejected this argument:

> "Nor are we persuaded by Home's argument that Rule 14(a) of the Federal Rules of Civil Procedure precludes recovery of these additional payments . . . because they represented no part of the adjudicated liability of C & M. The impleader

> device of Rule 14(a) was properly utilized. A single 'group or aggregate of operative facts giving ground or occasion for judicial action' was here involved." (328 F.2d, at 747-748)

The single "group or aggregate of operative facts" to which the Seventh Circuit referred, of course, was that giving rise to third-party plaintiff's right to full indemnity under a single indemnity agreement and *not* merely the specific facts of the original plaintiff's claim for $19,431.92. Thus, the Ninth Circuit is in direct and irreconcilable conflict with the Seventh Circuit on this critical issue of defining the "group or aggregate of operative facts" which determines the ancillary jurisdiction of the federal courts to entertain third-party claims for full indemnity in an amount greater than the primary claim.

The Ninth Circuit is similarly in conflict with the ruling of the Fourth Circuit in *Noland Co.* v. *Graver Tank & Manufacturing Co.*, 301 F.2d 43 (4th Cir. 1962). Conceptually the court held there that, once the duty of indemnification was raised by a third-party complaint, it was proper for the court to proceed under its ancillary jurisdiction to consider all claims arising out of the same *transaction*. The *transaction* there again was defined as the *right to indemnity*—the duty of third-party defendant indemnitor to third-party plaintiff indemnitee. The Fourth Circuit stated the issue as:

> "Whether under Rule 14, a third-party defendant, *once made a party to an action*, can be proceeded against by the third-party plaintiff upon a claim closely related to, yet different from and

> for an amount in excess of, the original plaintiff's claim asserted in the primary action. . . . Here the original defendant, third-party plaintiff, asserts against the third-party defendant not only a right to be indemnified to the extent of plaintiff's recovery but also the additional right to recover alleged loss of anticipated profit of $4,000.00." (301 F.2d at 49)

In its attempt to distinguish *Noland*, the Ninth Circuit states:

> "that the facts involved in the disputed claim were substantially the same as those in the primary suit, that the profit issue was not complicated or unduly burdensome, and that considering the issue would not appreciably prolong the litigation." (Infra, p. A5).

Yet in the case at bar, the amount of United's claim for total indemnity was an Agreed Fact in the Pre-Trial Order. Therefore it could neither have complicated nor unduly burdened the trial in the District Court in any way.

The Ninth Circuit's attempt to distinguish *Noland* by stating that "the disputed claim in *Noland* arose out of the same transaction as the principal claim" ignores the fact that the "transactions" both in *Noland* and the case at bar, involve the right to indemnity between the third-party plaintiff and the third-party defendant. The "transactions" in both *Noland* and the case at bar involved the duty of the indemnitors to the indemnitee and not the duty of the third-party plaintiff-indemnitee to the original plaintiff.

Both *Ruckman and Hansen* in the Seventh Circuit and *Noland* in the Fourth Circuit involved the application of Rule 14(a) to ancillary jurisdiction.

In 1966, Rule 18(a) was amended to provide that "a party asserting a claim to relief as an original claim, counter-claim, cross-claim or third-party claim, may join, either as independent or as alternative claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." Interestingly enough the Committee's Notes to the 1966 Amendment of Rule 18(a) cites the *Noland* case with approval.

When the Third Circuit had before it the case of *Schwab* v. *Erie Lackawanna Railroad Co.*, 438 F.2d 62 (3rd. Cir. 1971), it permitted the defendant-third-party plaintiff to join with its claim for indemnity-over a separate non-federal claim for its own damages. In so doing, the Third Circuit reasoned that the liability of the third-party defendant, truck owner, to the Railroad arose from the *duty of the truck owner to the Railroad* and not from the duty of the Railroad to the plaintiff Railroad employee. Thus, the third-party defendant, truck owner, had a single duty of non-negligence which it owed to the Railroad. The breach of that single duty permitted the court, under its ancillary jurisdiction, to decide not only the Railroad's claim for liability-over for the employee's injuries, but also to consider the Railroad's own claim for damages from the same breach.

The Ninth Circuit below rejected the reasoning of the Third Circuit in *Schwab* as having "a signifi-

cant flaw" (infra, p. A6). While approving *Schwab* on its facts, clearly the Ninth Circuit is in irreconcilable conflict with the rationale of the Third Circuit (as well as the Fourth and Seventh Circuits) which identified the *transaction* or *group of operative facts* as arising out of the *duty of third-party defendant to third-party plaintiff* even though that duty was broader than the partial right of indemnity for the amount of the original plaintiff's claim.

The reasoning of the Third Circuit in *Schwab*, which the Ninth Circuit found significantly flawed, was that the concept of ancillary jurisdiction was broad enough to encompass the Railroad's separate claim for its own damages under Rule 18(a):

> "We are persuaded, however, that the amendment was intended to permit the inclusion of such affirmative claims for relief as requested here by Erie. The rule assumes, of course, the existence of jurisdiction over the claim, for the Federal Rules do not extend the jurisdiction of the federal courts. But we are also convinced that the concept of ancillary jurisdiction is broad enough to encompass this claim." (438 F.2d at 68-69)

The Third Circuit found "formidable authority to support these conclusions." It cited the Advisory Committee on Rules in its comment to the 1966 Amendment to Rule 18(a),[1] Professor Charles Alan Wright

[1] "The Rules 'proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common.' Sunderland, The New Federal Rules, 45 W. Va. L.Q. 5, 13 (1938); see Clark, Code Pleading 58 (2d ed. 1947). Accordingly, Rule

in Wright, Federal Courts § 76 at 334 (1970),[2] Professor Wright's speech before the Judicial Conference of the Third Circuit as reported in 42 F.R.D. at 560-561,[3] and Barron & Holtzhoff, Vol. 1A Federal Practice and Procedure § 426, pp. 43-44 (Supp. 1969).[4]

18(a) has permitted a party to plead multiple claims of *all types* against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21. (Emphasis supplied.)"

[2] "Thus it is now clear that, as a matter of pleading, once a defendant has asserted a claim suitable for impleader under Rule 14(a), he may join with it any and all of his other claims against the third party defendant."

[3] "Now we are going to allow the original defendant to join with his third-party claim some other claim which he has. Can this come under the same rubric of ancillary jurisdiction, or does it have to have an independent jurisdictional ground of its own?

"On this the rule is wholly silent. The rules quite properly do not purport to speak to jurisdictional questions. They set out procedures, and you are going to have to apply your jurisdictional thinking, according to your best lights.

"My hope would be that in determining this the court would look to the factual relation between the third-party claim and the independent claim of the defendant. If the original defendant . . . adds some claim . . . [from] some other transaction some years before . . ., then I would think that he would have to have independent jurisdictional grounds, and that the venue would have to be independently proper for him to assert this. Otherwise, we would be bootlegging into the federal court things which the Congress said should not be there.

"But if the factual relationship is as close as in the example I originally put, where the claim . . . arises out of the very transaction which is the subject of the third-party claim, then it seems to me that within the existing knowledge about ancillary jurisdiction, you ought to be able to say, 'Yes, let's go ahead.'"

[4] "Thus defendant properly asserts a third-party claim against a third-party defendant. On well-settled principles, this claim is treated as ancillary, and need not independently meet the tests of jurisdiction and venue. Under amended Rule 18(a), the original defendant may join with the claim for liability over any other claim which he has against the third-party defendant. The joinder is proper as a matter of pleading.

The Third Circuit concluded:

> "For the purposse of jurisdiction, therefore, we believe that Erie's separate claim should survive, whether its claim be characterized as ancillary to the main claim or ancillary to the third-party claim which itself is ancillary to the original claim against the railroad." (438 F.2d at 70)

II

The Ninth Circuit decision also conflicts with the concepts of ancillary jurisdiction applied by the First, Second, and Fifth Circuits.

While the Ninth Circuit decision directly conflicts with the holdings in *Schwab*, *Noland*, and *Ruckman and Hansen* from the Third, Fourth, and Seventh Circuits, it also is contrary to the concepts of ancillary jurisdiction as recognized and applied by the First, Second, and Fifth Circuits.

While it is clear from Rule 82 that the Federal Rules of Civil Procedure *neither extend nor limit* jurisdiction of the United States District Courts, as Professor Fraser has stated in this article "Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts," 33 F.R.D. 27-28:

> "The Federal Rules do not expand the ancillary jurisdiction of the federal courts, but *they pro-*

If the additional claim arises out of the same transaction or occurrence as the claim for liability over—and thus, by hypothesis as the original claim of plaintiff against defendant—it would seem by analogy to principles settled in other areas, that the additional claim too should be treated as ancillary for purposes of jurisdiction and venue. (Footnotes omitted.)"

vide opportunities for invoking it in additional situations." (emphasis added)

One of the most cogent statements that the procedural reforms provided in the Federal Rules have extended to an appropriate extent the ancillary jurisdiction which already exists in the federal courts is found in Judge Charles E. Clark's opinion in *Lesnik* v. *Public Industrials Corporation*, 144 F.2d 968 (2nd. Cir. 1944):

> "Now, however well settled may be the general principle of federal ancillary jurisdiction, nevertheless it is sufficiently uncertain as to its exact limits, or, as it has been put, 'amorphous,' 53 Harv. L. Rev. 449, 458, 40 Col. L. Rev. 148, 153, to afford justification for a considerable amount of desirable procedural reform." (144 F.2d at 974)
>
> . . . . .
>
> "Since the adoption of the federal rules, it has been recognized that important provisions as to the addition of parties under Rules 13 (counterclaims), 14 (third-party practice), and 24 (intervention) may have limited effect if requirements of federal jurisdiction and venue are necessarily to be applied to all such parties just as though they were being originally sued by the plaintiffs in the actions. These rules are a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court. They should, therefore, receive such favorable construction as is possible, consistent with due recognition of the

settled principle that procedural rules cannot be used to extend federal jurisdiction or venue. Rule 82.

"But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. Cf. Freeman v. Bee Machine Co., 319 U.S. 448, 454, 63 S. Ct. 1146, 87 L. Ed. 1509. Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counterclaims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation." (144 F.2d at 973)

The First Circuit in *Walmac Company* v. *Isaacs*, 20 F.2d 108, 113, 114 (1st. Cir. 1955) states it thus:

"The doctrine of dependent or ancillary jurisdiction is not capable of exact definition. At least so far as we are aware no court has ever tried to fix its limits with any degree of precision. It springs from the equitable doctrine that a court with jurisdiction of a case may consider therein subject matter over which it would have no independent jurisdiction whenever such matter must be considered in order to do full justice."

In *United States for use and benefit of D'Agostino Excavators, Inc.* v. *Hayward-Robinson Company*, 430 F.2d 1077 (2nd Cir. 1970), the court's jurisdiction, as

in the case at bar, was predicated on the Miller Act. Defendant asserted counter-claims for over payments and extra costs allegedly incurred in completing both the Miller Act job and a non-federal job. The majority of the Second Circuit construed "transaction or occurrence" broadly enough to make the combination of claims on both jobs "compulsory" under Rule 13(a) (430 F.2d at 1081). Judge Friendly concurred, but he did not believe defendant's counter-claim on the non-federal job could properly be denominated as "compulsory." Nevertheless, reviewing Judge Clark's "fine opinion" in *Lesnik*, he concurred in upholding federal court disposition of all of these matters in a single action:

> ". . . At least since United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d. 218 (1966), it is no longer thought the heavens will fall if a federal court deals with a non-federal claim when it is convenient to do so." (430 F.2d at 1088)

The Second Circuit recently recognized the full effect of Amended Rule 18(a) in permitting joinder of an otherwise non jurisdictional cross claim, *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 635 (2nd. Cir. 1972). In so doing the Second Circuit cited with approval *Crompton-Richmond Co., Inc. Factors* v. *United States*, 273 F. Supp. 219, 221 (S.D. N.Y. 1967), which case was cited by Judge Solomon in the District Court decision below (infra. p. C8).

The Fifth Circuit in *Revere Copper and Brass, Inc.* v. *Aetna Casualty & Surety Co.*, 426 F.2d 709

(5th Cir. 1970) similarly held that a third-party defendant could assert a claim against the original plaintiff, even though its claim was *ancillary to the ancillary third-party action* which brought it into the case.

In their book on *Federal Practice and Procedure*, Wright and Miller, in Section 1452, deal with the question of claims in excess of plaintiff's claims and additional claims. They point out, citing *Ruckman and Hansen* and *Noland*, that prior to the 1966 Amendment to Rule 18, federal courts seemed willing to allow claims for amounts in excess of what the third-party plaintiff might be held liable for in the original action, when "the claim was considered to be single in nature":

> "Thus, for example, in the Noland case referred to earlier the original suit was for breach of contract, and the third-party claim was against defendant's supplier for the damages defendant might have to pay plaintiff and for defendant's lost profits arising out of the transaction. It appears that defendant actually had only one claim against the supplier, that based on nondelivery. Indeed, the rule against splitting a cause of action might have barred him from seeking lost profits in a subsequent suit if he previously had gained indemnification in the impleader action. Thus, as a practical matter defendant may have had only one opportunity to sue—to recover over all or part of what plaintiff was claiming against defendant—and it was a proper third-party claim, even though the claim included additional elements of damage." (Wright and Miller, Vol. 6, pp. 285-286)

. . . . .

> "The 1966 amendment to Rule 18 and the accompanying Advisory Committee Note should eliminate the need for drawing distinctions between single and multiple claims. It also should further the underlying purpose of Rule 14, which is to avoid multiplicity of actions and to promote the expeditious resolution of disputes between parties. Once a court has determined that a proper third-party claim has been asserted, it should allow joinder of any other claims the third-party plaintiff may have against the third-party defendant." (Ibid, Volume 6, page 286)

Clearly, that was the situation facing United in the case below. At the time it filed its third-party complaint it had a single ripe cause of action to require specific performance of its indemnity agreement. It could only seek such relief in one proceeding; otherwise, it would have been subjected to criticism that it was splitting its cause of action. Obviously, it could not have obtained specific enforcement of the indemnity agreement in the federal court and at the same time have sought the same relief in a state court. Further, it would have been absurd to require United to seek specific enforcement in each separate Miller Act claim filed against it in federal court. Particularly when the occasion for the exercise of specific enforcement required mandatory and restraining injunctive relief to stop fraudulent activities on the part of the third-party defendants, one court of equity had to assume full control over all of the conduct of the third-party defendants.

III

The decision of the Ninth Circuit is in conflict with the controlling decisons in this Court.

The Ninth Circuit acknowledged that "the district court properly asserted jurisdiction over United's claim for indemnification as to Payne's claim." (infra, p. A5). United's claim over against Respondents, however, involved a single cause of action for specific enforcement of a single indemnity agreement, which single cause of action was ripe for adjudication at the time the third-party complaint was filed. This Court has recognized in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d. 218, 228, 86 S. Ct. 1130 (1966) concerning ancillary (pendant) jurisdiction, that "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." Constitutionally this Court reminds us, pendant jurisdiction:

> ". . . exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .,' US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constituitonal 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their fed-

> eral or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is *power* in federal courts to hear the whole." (383, U.S. at 725, 16 L.Ed. 2d. at 227-228)

Pendant jurisdiction, as used by this Court in *Gibbs*, refers to that ancillary jurisdiction in which a single "cause of action" is predicated both on a federal claim and a state claim. This Court in *Gibbs* cites Clark on *Code Pleading* and other articles for a broad definition of "cause of action" (383 U.S. at 722-723). Pendant jurisdiction, of course, is one aspect of the broader scope of ancillary jurisdiction, invoked with respect to counter-claims, cross-claims, and third-party claims in situations where a primary claim is predicated either upon diversity or federal question jurisdiction.

This Court's modern approach to ancillary jurisdiction came in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 70 L. Ed. 750, 46 S. Ct. 367, 45 A.L.R. 370 (1926). There this Court pointed out that despite the fact that plaintiff's federal claim failed, defendants counter-claim (not based on federal question jurisdiction) was properly decided by the court because it "only needs the failure of the former to establish a foundation for the latter."

In the case at bar, once there was at issue all the aspects of Respondent's fraudulent conveyances and other fraudulent behavior, as well as their challenges to the validity of the indemnity agreement, the court

under its admitted jurisdiction for partial indemnity-over was required to determine all of the issues involved in the case. When, in order to effectuate its ultimate decision and grant appropriate full relief, it entered judgment for the full amount of indemnification, which amount was an Agreed Fact in the Pre-Trial Order, the court was merely carrying out what was clearly part of its ancillary jurisdiction to effectuate that which was admittedly within its jurisdiction.

The District Court's determination in this case was not unlike that which this Court deemed appropriate in *Dugas* v. *American Surety Co. of New York*, 300 U.S. 414, 57 S. Ct. 515, 81 L. Ed. 720 (1937). There American Surety Company, after maintaining an interpleader and obtaining discharge of its obligations under a bond, was faced with a state court action by a claimant seeking to recover a greater amount than his prorata share determined in the interpleader. This claimant deliberately kept the amount of his claim to $2,999.00 to forestall removal to the federal court. After the Supreme Court of Louisiana permitted this claimant to continue his claim in the state court, American Surety filed in the federal court a supplemental bill, in which it sought to enjoin this claimant from prosecuting his state court suit. The claimant challenged the jurisdiction of the federal court but this challenge was overruled. In affirming, this Court held that the bill was ancillary and dependent upon the original matter and therefore, jurisdiction followed the original suit "regardless of the cit-

izenship of the parties to the bill or the amount in controversy" (300 U.S. at 428). This Court indicated that the power to do this arose from its power to effectuate its decrees. Similarly in the case below, the district court, once having determined the validity of the indemnity agreement, having adjudicated Respondent's equitable defenses and having determined the fact of fraudulent conveyances and concealment, found it necessary, in order to effectuate its decree, to award full relief to United, the amount of which was an Agreed Fact in the Pre-Trial Order.

Rule 18(b) specifically sanctioned plaintiff equitably seeking to set aside fraudulent conveyances and imposing a constructive trust as part of a "single action" to obtain indemnity (recovery money). The stipulation between plaintiff and the original third-party defendants (Appendix D) clearly recognized that. The procedure was also sanctioned by the Ninth Circuit, applying Oregon law, in *Milwaukie Construction Company* v. *Glens Falls Insurance Co.*, 367 F.2d 964 (9th Cir., 1966).

The Ninth Circuit in its decision, without any factual support, makes the statement that "the third-party claim complicated and prolonged the original suit" (infra, p. A6). Not only is that statement unsupported either in the decision or in the record, but the Ninth Circuit virtually contradicts its own statement by acknowledging that the issue of the amount of total indemnity was not a complicating factor in the trial below as "all parties stipulated before trial that this figure represented United's total expenses

. . . [for which Discount and Norelius were obligated under their indemnity agreement]." (infra, p. A3, fn. 2). Furthermore, the Ninth Circuit acknowledged that "to decide the liability-over issue and establish Discount's and the Noreliuses' liability for the Payne claim required the district court to consider many of the same issues involved in United's claim for $145,000." (infra, p. A6). In fact, to decide Discount's and the Noreliuses' liability for the Payne claim required the district court to consider *all* of the issues involved in United's claim for $145,000, except for the amount, which was an Agreed Fact.

IV

The District Court's determination of the scope of ancillary jurisdiction, based on considerations of "judicial economy, convenience and fairness to litigants" necessarily is discretionary and should not be reversed except in clear cases of abuse of discretion.

The Ninth Circuit decision below also contradicts this Court in *Gibbs* that the question of the exercise of pendant or ancillary jurisdiction "is a doctrine of discretion" (383 U.S. at 726).

Given the "amorphous" and "equitable" nature of ancillary jurisdiction, it is understandable that in determining the very issue of jurisdiction, the discretion of the district judge must necessarily be invoked. It is the district judge who can best determine "considerations of judicial economy, convenience and fairness to litigants." As the Fourth Circuit stated in *Noland*, in determining that the $4,000.00 claim for lost prof-

its could be included in the third-party complaint, "one of the primary objectives of third-party procedure is to avoid circuity and multiplicity of action. In view of the ease with which disposition of all claims herein could be made in this one action, we conclude that Rule 14 should be construed to be sufficiently broad and flexible as to permit the district court, *in the exercise of its sound discretion*, to make this disposition." The question of whether the claim of right to indemnification could or could not be litigated expeditiously and without serious and seemingly endless complications, could be determined with "relative ease and minimum effort" *by the district court* "through usual and approved pretrial procedures." (301 F.2d at 50, emphasis added). See also, *Schwab* v. *Erie Lackawanna Railroad Co.*, supra, at 71-72.

In the case at bar, the District Court approved the stipulation entered into on October 13, 1969 between United and Respondents at the outset of the filing of the third-party complaint. That stipulation provided for the immediate posting of collateral security and protection of the status quo by enjoining continued fraudulent conveyances and concealment of assets. Thereafter, the case proceeded for approximately one year and substantially through pre-trial procedures, before the court's jurisdiction to entertain the claim for full indemnity was first questioned, in September, 1970. At that time the District Court was in a position to ascertain, by applying its sound discretion, whether the question of full indemnification, as opposed to partial indemnification, could be litigated with "relative ease and minimum effort."

The Ninth Circuit below entirely ignored the discretionary character of the District Court's right to determine matters of judicial convenience and economy, as applied to the use and extent of ancillary jurisdiction. Instead, the Ninth Circuit adopted what at best can be called a totally mechanistic concept, inconsistent with the decisions of this Court concerning the flexible and equitable nature of ancillary jurisdiction. The Ninth Circuit seemed overwhelmed by the fact that total indemnity was "seventy-two times greater than Payne's [original claim]." This claim, the Ninth Circuit said "cannot without much straining be described as *auxiliary* or *subordinate*" (infra, p. A6, emphasis added).

This statement misconceives the concept of "ancillary." As Professor Fraser states, "The ancillary claim *does not have to be a subordinate claim*; it may be a claim which could have been the basis of an independent action in a state court. The jurisdiction of the court to hear the claim depends on its jurisdiction over another claim, but *the claim itself does not have to be dependent on or inferior to the other claim.*" (33 F.R.D. at 27-28; emphasis added)

CONCLUSION

In overruling the trial court determinations of both Judges Goodwin and Solomon, the Ninth Circuit ruled in conflict with the decisions of the other circuits and in conflict with the decisions of this Court:

1. The Ninth Circuit failed to recognize that

plaintiff's third-party claim for specific enforcement of an indemnity agreement was a single cause of action for total indemnity, and that to require it to assert only partial indemnity in the case below would have required United to split a single cause of action.

2. United's third-party claim for specific enforcement of an indemnity agreement, seeking total indemnification, was a proper third-party claim under Rule 14(a), permissible under concepts of ancillary jurisdiction.

3. Even should the Court consider the claim for total indemnification a distinct and separate claim from the claim for partial indemnity-over for Payne's claim (the amount of the original complaint), joinder of such claim was appropriate under concepts of ancillary jurisdiction, now clearly permitted and anticipated by Rule 18(a) of the Federal Rules of Civil Procedure, as amended in 1966.

4. In applying concepts of ancillary jurisdiction, the trial court properly exercised discretion, based upon substantial pre-trial procedures in which it was determined that the amount of total indemnification, as distinguished from partial indemnification, was an Agreed Fact in the Pre-Trial Order and did not in any way complicate or prolong the trial.

5. The very nature of the District Court's admittedly proper assumption of jurisdiction for specific enforcement of an indemnity agreement for partial indemnification, necessarily required the District Court to assume jurisdiction for total indemnifica-

tion in order to effectuate the stipulation between United and Respondents entered on October 13, 1969 and the mandatory and restraining injunction entered by the District Court pursuant to the stipulation. The Ninth Circuit acknowledges that this action by the District Court was properly within its jurisdiction. It would have been unreasonable to limit the District Court's specific enforcement of a single indemnity agreement to partial indemnity, particularly when faced with Respondents' continuing course of fraudulent transfers and concealment of assets.

6. The Ninth Circuit decision is in direct conflict with the decisions of the Third, Fourth and Seventh Circuits in *Schwab, Noland* and *Ruckman and Hansen.* It is in conflict with the broad equitable concepts of ancillary jurisdiction enunciated by this Court in *Moore* and in *Gibbs*, by the First Circuit in *Walmac*, the Second Circuit in *U.S.* v. *Hayward-Robinson Company* and *First National Bank of Cincinnati* v. *Pepper* and the Fifth Circuit in *Revere Copper and Brass, Inc.* v. *Aetna Casualty & Surety Co.*

For the foregoing reasons this Petition for Writ of Certiorari should be granted, the Judgment of the Court of Appeals reversed and that of the District Court affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U.S.A. for the Use of STANTON W. PAYNE,
Plaintiff,

vs.

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,
Defendant and Third Party Plaintiff-Appellee,

vs.

DISCOUNT COMPANY, INC., a corporation, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, ELJM E. NORELIUS, AGNES NORELIUS and EARL ANGELL,
Third Party Defendants-Appellants.

No. 71-2711

[January 5, 1973]

Appeal from the United States District Court
for the District of Oregon

Before: WRIGHT and CHOY, Circuit Judges, and TAYLOR,* District Judge.

CHOY, Circuit Judge:

Stanton W. Payne furnished equipment and labor to appellant Discount Co., Inc. (Discount), a Washington corporation, for work in Oregon by Discount under a contract dated May 20, 1968 with the United States Department of Agriculture Forest Service at the Mona Campground and Lookout Boating Site (Mona Project). Pursuant to the Miller Act, 40 U.S.C. §270(b), Payne sued United Pacific Insurance Co. (United), a Washington

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

corporation, surety for Discount on performance and payment bonds for the project.

On August 8, 1967 Discount, its President Richard R. Norelius, and his wife Phyllis L. Norelius had entered into a general indemnity agreement with United covering all liabilities and attorney's fees incurred by United under the bonds posted for Discount. United had also posted similar bonds for another project in Oregon, the North Waldo Campground (Waldo Project).

In the summer of 1969, Discount having completed neither project, disputes arose between Discount and the Forest Service on the scope and progress of the work. In July and August 1969, the Forest Service terminated the contracts on both projects for default by Discount. As required by its performance bonds, United completed the work on the projects. United established reserves in excess of $110,000 expecting losses in completing the projects and in paying other claims besides Payne's. United demanded that Discount and the Noreliuses post collateral security pursuant to the 1967 indemnity agreement. Upon learning that Discount and the Noreliuses were transferring and concealing assets to avoid the demand for collateral, United impleaded Discount and the Noreliuses as third-party defendants.[1]

United prayed for specific performance of the indemnity agreement including the posting of additional security, an injunction against any transfer or concealing of assets, and for judgment against Discount and the Noreliuses for any liability to Payne.

In October, 1969, pursuant to stipulation by all parties, the injunction sought by United was issued. Discount and the Noreliuses did not comply with the injunction, so in December, 1969 Elim and Agnes Norelius (Richard's parents) were added as third-party defendants solely to the issue of fraudulent concealment of assets by the original third-party defendants.

In April, 1970 ten months prior to the trial, United settled Payne's claim for $2,162.40. Also prior to trial, United completed

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[1]Earl Angell, Vice-president of Discount was also made a third-party defendant. Angell filed a cross-claim against Discount and the Noreliuses for a breach of an agreement to divide profits from the construction of a house. This house was involved in the suit since it was built by Norelius with funds allegedly concealed from United.

both projects at a total cost of $145,777.67.[2] Thus, at the time of trial all of United's claims were liquidated and its suit for specific performance of the indemnity agreement was in effect a suit for damages.

The district court, sitting without a jury, held that the indemnity agreement was valid and awarded United $145,777.67 damages and $25,000 attorney's fees, granted United an accounting, transferred to United identified assets, and imposed a constructive trust on the house found to have been built with funds diverted from Discount.[3] We reverse.

Payne's original claim was within federal jurisdiction because it arose under a federal statute. But the third-party claim was neither based on a federal statute nor asserted between citizens of different states. Independently considered, it was not within federal jurisdiction. However, the district court ruled that the third-party claim was "ancillary" to the original action and so no further jurisdictional basis was required to support it. The correctness of that ruling is the main issue on this appeal.

"It is well settled that a grant of jurisdiction over particular subject matter includes the power to adjudicate all matters ancillary to the particular subject matter." *Glens Falls Indemnity Co. v. United States ex rel Westinghouse Electric Supply Co.*, 229 F.2d 370, 373 (9th Cir. 1955). This is true regardless of the absence of diversity of citizenship or of a federal question in the ancillary suit.[4] *Glens Falls*, supra.

"Ancillary claims may be entertained 'to prevent the relitigation in other courts of the issues heard and adjudged in the original suit'" *Glens Falls*, supra at 374; and to promote the economical and expeditious administration of justice by avoiding

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[2]All parties stipulated before trial that this figure represented United's total expenses under all the bonds on both projects.

[3]The court also ruled that Angell recover one-half the profits from the sale of the house, in addition to $1,950.69 he had already received. Angell was not held liable for any of United's claim.

[4]The settlement of Payne's original claim prior to trial did not terminate the power of the court to decide only the ancillary third-party claims. *Hurn v. Oursler*, 289 U.S. 238 (1933); *Pennsylvania R.R. Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843 (3rd Cir. 1962); *Dery v. Wyer*, 265 F.2d 804 (2nd Cir. 1959).

a multiplicity of suits through permitting issues and claims arising out of the same operative facts to be embraced in a single action. West's Federal Practice Manual, M.L. Volz, Ed. Vol. 6, Sec. 7367, pg. 412 (1970).[5]

But, we cannot lose sight of the fact that federal courts are courts of limited jurisdiction. We must weigh the "desire to preserve the integrity of constitutionally based jurisdictional limitations against the desire to dispose of all disputes arising from one set of facts in one action." 6 Wright & Miller, Federal Practice and Procedure, Sec. 1444, 221 (1971); *accord, Dery v. Wyer*, 265 F.2d 804, 811 (2nd Cir. 1959) (Lumbard, J. dissenting).

Decisions discussing the concept of ancillary jurisdiction have applied a number of tests in delineating the concept.[6] This court has stated that ancillary means auxiliary, accessorial or subordinate, and that third-party claims are ancillary if the claims arise out of the subject matter of the original action and involve the same persons and issues, *Glens Falls*, supra at 374 or if they arose out of the same "transaction or occurrence." *L & E Co. v. United States ex rel Kaiser Gypsum Co.*, 315 F.2d 880, 882 (9th Cir. 1965).[7]

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[5]The Federal Rules of Civil Procedure substantially increase the possibility that all claims will be adjudicated in a single proceeding. Rules 13, 14, and 18 provide for a liberal joinder of claims, cross-claims, counterclaims, and third-party claims. But the rules do not confer jurisdiction upon federal courts. Rule 82 specifically provides that the rules should not be interpreted to enlarge the jurisdiction of the courts. Thus, while the third-party claims in the case at bar could properly be pleaded under Rules 14(a) and 18(a) this does not eliminate the jurisdictional question. C. Wright, Federal Courts §76 (2d ed. 1970); Notes of Advisory Committee on Rules, Fed. R. Civ. P. 18(a), 28 U.S.C. App. 2276 (Supp. V, 1970).

[6]For a general discussion of the history of ancillary jurisdiction see Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 Va. L. Rev. 265 (1971).

[7]Other circuits have adopted similar tests. The Second and Third Circuits employ the "transaction or occurrence" standard. *Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62, 70-1 (3rd Cir. 1971); *United States ex rel D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077, 1082 (2nd Cir. 1970). The Fifth Circuit holds that a claim is ancillary when it bears a logical relationship to the aggregate core of operative facts which constitutes the main claim. *Revere Copper and Brass, Inc. v. Aetna Casualty & Surety Co.*, 426 F.2d 709, 714 (1970).

Under these tests the district court properly asserted jurisdiction over United's claim for indemnification as to Payne's claim.[8] Both claims involved the same core of facts and both arose out of the same transaction. United's claim only sought a transference of its liability to Payne. "In effect, the supplemental proceeding serves to accomplish full justice with reference to any award made on the principal claim." *Pennsylvania R.R. Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843, 844 (3rd Cir. 1962).

May United's other claims also be considered ancillary to Payne's original suit? We think not. We know of no other decision that has extended the concept of ancillary jurisdiction to cover the instant situation. We do not think it advisable to so expand the concept. Two decisions have discussed this problem and both cases are distinguishable from ours.

In *Noland Co. v. Graver Tank & Manufacturing Co.*, 301 F.2d 43 (4th Cir. 1962) a general contractor sued a subcontractor for breach of contract to provide a water tank. The subcontractor filed a third-party complaint against his supplier for indemnification and in addition asserted a further claim for $4,000 loss of anticipated profits. The court held that the latter claim was ancillary to the original suit. It noted that the facts involved in the disputed claim were substantially the same as those in the primary suit, that the profit issue was not complicated or unduly burdensome, and that considering the issue would not appreciably prolong the litigation. Unlike the case at bar, the disputed claim in *Noland* arose out of the same transaction as the principal claim and there was a close nexus between it and the principal claim.

More in point is *Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62 (3rd Cir. 1971), where a railroad employee brought an FELA suit against the railroad for injuries resulting from a train-truck collision. The railroad impleaded the owner of the truck seeking contribution or indemnification, and also asserted a claim as permitted by F.R.C.P. 18(a) against the truck owner for damage to the train. The court held that there was no need for an independent jurisdictional basis for the latter claim because the claim was ancillary to the principal claim since it arose out

[8]This aspect of the judgment is not contested and our decision does not disturb it.

of the same transaction or occurrence; i.e. the accident. On the facts of that case, the decision is undoubtedly correct.[9] All the claims involved were factually and logically related. There was a strong nexus between the principal claim and the disputed claim.

But here we perceive no close nexus between the third-party claim and the original suit by Payne. The claim for specific performance of the indemnity agreement, in effect a suit for $145,000, can hardly be considered to have arisen out of the same transaction as the original $2,000 suit. Payne's claim was for work done on the Mona Project. United's third-party claim was based on an indemnity agreement and damages arising from four separate bonds covering two projects (on one of which Payne never worked). The third-party claim, seventy-two times greater than Payne's, cannot without much straining be described as auxiliary or subordinate. Rather than simplifying the issues and avoiding a duplication of evidence, the third-party claim complicated and prolonged the original suit. Regardless of the success or failure of Payne's suit, United's claim against Discount and the Noreliuses would persist entirely independently. The fact that the third-party claim arose from the same general background does not suffice as a nexus. *Cf., United States Fidelity & Guaranty Co. v. American State Bank*, 372 F.2d 449 (10th Cir. 1967).

We realize that to decide the liability-over issue and establish Discount's and the Noreliuses' liability for the Payne claim required the district court to consider many of the same issues involved in United's claim for $145,000. But whether the court properly had power under the concept of ancillary jurisdiction depends on the third-party claim being ancillary to the claim over which the court properly has juridiction. We reject the sugges-

[9]See, Note, *Third-Party Plaintiff May Assert Claim For Affirmative Relief Against Third-Party Defendant Under Rule 18(a) Without Independent Jurisdictional Grounds If Claim Arises From The Same Transaction Or Occurrence As Claim For Liability-Over—Schwab v. Erie Lackawanna Railroad*, 46 N.Y.U.L.Rev. 634 (1971). The note agrees that on the facts of the case the decision is correct but it finds a significant flaw in the court's approach. It rejects the suggestion that a third-party claim comes within the scope of the concept of ancillary jurisdiction because it is ancillary to an already ancillary claim. The note states that a third-party claim should be considered as ancillary only if there is a logical nexus between it and the principal claim. We agree with the article's reasoning.

tion that a federal court can assume jurisdiction over the claim for total indemnification merely because it is ancillary to a proper ancillary claim for liability-over. The concept of ancillary jurisdiction should not have such a broad reach.[10]

Since the district court did not have jurisdiction over United's third-party claim in excess of its claim for indemnification for Payne's claim, we must vacate that part of the judgment attributable to more than Payne's claim and costs and attorneys fees allocable thereto. In addition, we vacate the award of damages to Angell since his claim was even further removed from the original suit than United's.

Reversed in part and remanded.

[10]Id. at 640-1.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-15-73—480

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S.A. for the Use of STANTON W. PAYNE, Plaintiff, v. UNITED PACIFIC INSURANCE COMPANY, a Washington Corporation, Defendant and Third Party Plaintiff-Appellee, v. DISCOUNT COMPANY, INC., a Corportaion, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, ELIM E. NORELIUS, AGNES NORELIUS and EARL ANGELL, Third-Party Defendants-Appellants.	)	No. 71-2711 ORDER

Before: WRIGHT and CHOY, Circuit Judges and TAYLOR,* District Judge.

* The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

U.S.A. for the Use of
STANTON W. PAYNE,
Plaintiff,

v.

UNITED PACIFIC INSURANCE COMPANY, a Washington Corporation,
Defendant and
Third-Party Plaintiff,

v.

DISCOUNT COMPANY, INC., a Corporation, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, ELIM E. NORELIUS, AGNES NORELIUS and EARL ANGELL,
Third-Party Defendants.

Civil No. 69-324

OPINION

July 30, 1971

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Discount Company, Inc., Richard R. Norelius, Phyllis L. Norelius, Elim E. Norelius and Agnes Norelius.

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Attorney for Third Party Defendant
Earl Angell.

SOLOMON, Judge:

Stanton W. Payne filed this action on June 6, 1969, against United Pacific Insurance Company (United Pacific) under the Miller Act, 40 U.S.C. § 270(b), for the amounts which Payne claimed due for labor and materials furnished to Discount Company, Inc., (Discount) on government contracts to build recreational facilities at Mona Lake and Waldo Lake in the Oregon Cascades.

Because of the many motions and orders in this case which involve not only the original parties but numerous additional parties, I shall set forth chronologically in some detail the pleadings that were filed, the parties that were added, the claims that were made, and the orders that were entered, before I discuss the evidence adduced at the trial.

On September 15, 1969, United Pacific filed a third party complaint naming Discount, Richard R. Norelius (the president of Discount) and Phyllis L. Norelius (the wife of Richard Norelius) as parties liable to United Pacific for all or part of Payne's claim. The complaint also named as a third party defendant Earl Angell, an employee of Norelius who asserted a claim for his services on the government contracts and also an interest in certain assets of Norelius.

United Pacific alleged:

(1) that on August 8, 1967, Discount and the Noreliuses agreed to hold harmless and indemnify United Pacific for all liabilities and attorney's fees

incurred on the performance and payment bonds which United Pacific posted for Discount;

(2) that Discount's defaults exposed United Pacific to more than $111,500 in claims on these bonds;

(3) that Discount and the Noreliuses conspired and acted to deprive United Pacific of its rights under the indemnity agreement by withholding equipment and materials needed to complete the contracts, by transferring and concealing assets, and by failing to post collateral security with United Pacific.

United Pacific sought a money judgment, costs, attorneys' fees and a mandatory injunction.

On October 13, 1969, I approved a stipulation between United Pacific, Discount and the Noreliuses to the entry of a decree which required:

(1) Discount and the Noreliuses to execute necessary documents and post collateral security of $111,500 with United Pacific;

(2) Discount and the Noreliuses to cooperate with United Pacific to complete the government contracts and to prosecute any claims which United Pacific may make against the government;

(3) Discount and the Noreliuses to refrain from transferring or concealing assets which should be posted with United Pacific;

(4) Discount and the Noreliuses to promptly furnish a complete financial statement to United Pacific;

(5) the Noreliuses to deposit the proceeds from

the sale of a certain real property in Astoria, Oregon, in a trust account to be disbursed on the Court's order.

Also on October 13, 1969, Earl Angell withdrew his claim against United Pacific to compensation due for his services on the government contracts.

On November 7, 1969, Elim E. Norelius and Agnes Norelius (the father and mother of Richard Norelius) borrowed $16,000 secured by a first mortgage on the real property in Astoria.

On December 5, 1969, United Pacific not only added Elim and Agnes Norelius as third party defendants, but also filed an amended complaint to impress a lien on the proceeds of the mortgage and on the interests of Elim and Agnes Norelius.

On January 15, 1970, Elim and Agnes Norelius filed a motion to dismiss the amended third party complaint against them on the ground that they had been improperly joined.

United Pacific resisted the motion. It contended:

(1) that in 1969 Richard Norelius bought a lot and partially completed house in Astoria, Oregon, from Elim and Agnes Norelius for $6,000;

(2) that Richard Norelius and Earl Angell completed the house and listed the property for sale under the name of Richard Norelius;

(3) that by giving a $16,000 mortgage on the property, Elim and Agnes Norelius became part of a conspiracy to defeat United Pacific's interest in the property;

(4) that Elim and Agnes Norelius are essential parties for a full adjudication of United Pacific's rights.

On February 13, 1970, third party defendants Discount, Richard Norelius and Phyllis Norelius filed their answer. They admitted the agreement to indemnify United Pacific, but they alleged that it covered only the Waldo Lake contract. They also alleged that United Pacific may not recover because it breached its agreement not to assume or complete the contracts if Discount refused to perform them because of Discount's disputes with the U. S. Forest Service. They further alleged that but for United Pacific's promise, Discount would have completed the contracts at a profit. They also sought to join the U. S. Forest Service as an indispensable party.

On February 26, 1970, Elim Norelius and Richard Norelius by affidavits stated that in 1969 Elim Norelius paid $6,200 to Richard Norelius to have Earl Angell complete the Astoria house and that Richard Norelius in turn paid Earl Angell $6,100 for his work and materials.

On March 4, 1970, I denied the motion of Elim and Agnes Norelius to dismiss the third party complaint, and I also denied the motion of Discount, Richard Norelius and Phyllis Norelius to join the U. S. Forest Service.

On April 2, 1970, United Pacific settled Payne's claim for $2,162.40.

On May 14, 1970, Richard Norelius, acting with-

out a lawyer, on behalf of himself, his wife and Discount, filed a "cross-complaint" against United Pacific for breach of its alleged promise not to take over the contracts and complete them. The "cross-complaint" sought restitution and profits on the contracts, restitution of Discount's bonding capacity, and punitive damages of $450,000.

On May 25, 1970, United Pacific moved to strike the cross-complaint filed by Richard Norelius on three grounds: (1) that Discount and the Noreliuses waived the right to raise the matters in the cross-complaint by stipulating to the entry of a decree on October 13, 1969; (2) that the delay in filing the cross-complaint prejudiced United Pacific; and (3) that Richard Norelius is not an attorney and could not appear for anyone other than himself. The motion to strike was granted.

On July 10, 1970, Discount and the Noreliuses, having hired new counsel, sought leave to file an amended cross-complaint, and United Pacific filed a motion to require Discount and the Noreliuses to comply with the decree of October 13, 1969. On July 31, 1970, Discount and the Noreliuses moved to vacate that decree.

On August 3, 1970, I ordered Norelius to deposit money in accordance with the decree or to show cause why he should not be held in contempt. I also denied the motions of Discount and the Noreliuses to file an amended cross-complaint and to vacate the decree.

On August 26, 1970, Earl Angell filed an answer

to United Pacific's third party complaint, a counterclaim against United Pacific, and a cross-claim against Discount and the Noreliuses.

Angell alleged that he agreed to complete the house in Astoria acquired by Richard Norelius from his father; that, when sold, he and Richard Norelius would divide the profits equally; and that the reasonable value of Angell's services and his share of the anticipated profits from the sale of the house were both $6,500. Angell sought to impress a lien for that amount.

On September 15, 1970, the Court [Judge Alfred T. Goodwin] denied the motion of the other third party defendants to strike Angell's complaint and to dismiss United Pacific's third party complaint for lack of jurisdiction.

On October 16, 1970, United Pacific brought contempt proceedings against Richard Norelius for his wilful failure to comply with the Court's orders. On October 27, 1970, the Court ordered that unless John Cordell McGraw, an employee of Norelius, was produced for a deposition within 30 days, the pleadings of Discount, Richard Norelius and Phyllis Norelius should be stricken and their default entered. McGraw was not produced, but United Pacific waived the right to have the pleadings stricken or a default entered. On November 25, 1970, I ordered that the imposition of sanctions against Discount, Richard Norelius and Phyllis Norelius would be held in abeyance until after the case was tried on its merits.

On February 2 and 3, 1971, the case was tried without a jury.

At the trial, Discount and the Noreliuses renewed their objection to the Court's jurisdiction on the ground that the amount of United Pacific's third party claim is greater than United Pacific's liability to Payne. I overruled the objection. Fed. R. Civ. P. 18(a), as amended July 1, 1966; *Crompton-Richmond Co., Inc., Factors* v. *United States*, 273 F. Supp. 219 (S.D. N.Y. 1967).

The evidence at the trial showed a consistent pattern of wrongdoing by Richard Norelius, aided by members of his family and others.

The wrongdoing began when Norelius submitted false financial statements to obtain United Pacific's approval of Discount's desired bonding capacity. Norelius showed as a $4,000 asset stock in a dissolved corporation and as a $5,000 asset stock in an insolvent corporation. He misrepresented his equity in three parcels of real estate, and he overstated the collectible accounts receivable from his used car business.

On August 28, 1967, and May 20, 1968, Discount contracted with the U. S. Forest Service to construct North Waldo Campground and Mona Campground and Lookout Boating Site. Discount worked on the projects in 1967 and 1968 but failed to work on either project in 1969.

Discount and the Forest Service had many disputes on contract specifications and change orders. The work was often delayed, and Discount fell behind

in the payment of claims to its subcontractors and materialmen. During the spring of 1969, Norelius repeatedly told the Forest Service that Discount would finish both jobs if given a chance, and he submitted work schedules assuring completion in the 1969 work season. He also asked United Pacific to urge the Forest Service not to terminate Discount. These representations were made at a time when Norelius knew that he did not have either the resources or the desire to complete the work.

In mid-July, 1969, Norelius told the Forest Service that he had "been advised by counsel" that he "should not resume work until questions related to his [claims] are resolved." These statements were false.

The Forest Service terminated Discount for default on North Waldo in late July, 1969, and on Mona in mid-August, 1969. United Pacific entered into takeover agreements with the Forest Service for both contracts. On September 2, 1969, United Pacific established reserves of $111,500 to complete the contracts. United Pacific eventually paid $141,296.44 to the completing contractor on North Waldo and $101,573.90 to the completing contractor on Mona.

There were several reasons for the high cost of completion. Discount's original bid on North Waldo was $40,000 less than the engineer's estimate and the next lowest bid. Discount overbid the early portions of the work and underbid the later portions. The Forest Service paid claims for work which had not been

completed, and the work which had been completed required substantial corrections.

Norelius also approved inflated claims against the payment bonds and then got "kickbacks" from the subcontractors. At the trial, United Pacific proved two kickbacks—one from a plumbing subcontractor for $5,075 and the other from a logging company for $3,700 to Norelius and $495 to John McGraw, an employee of Norelius.

When United Pacific took over the contracts, it could not find certain equipment and materials which were supposed to be on the jobsites and which were necessary to complete the jobs. Norelius did not inform United Pacific until October 3, 1969, that the equipment and materials were in a cabin at Blue River.

On September 2 and 3, 1969, Norelius gave three mortgages on his real properties in Woodland, Washington. The first, for $3,500, named his sister and brother-in-law as mortgagees; the second, for $5,500, named his brother and his brother's wife; the third, for $8,500, named a proposed but non-existent business composed of Richard Norelius and his attorney. Norelius prepared the mortgages himself, recorded them, and had them returned to him.

In spite of the decree of October 13, 1969, issued with his approval, Richard Norelius continued to transfer and conceal his assets. He concealed his ownership of the Astoria house, altered his books and kept inadequate records, diverted funds through one of his

employees, conducted a used car business without adequate records, and misrepresented his interest in a tractor loader.

1. Astoria house. The evidence at trial refuted the story of Richard and Elim Norelius that Elim Norelius retained ownership of the Astoria house and paid Richard Norelius $6,200 to have it completed. In April, 1969, Elim Norelius prepared and executed a deed conveying the house and lot to Richard Norelius. Discount paid Earl Angell $9,325 which Angell spent on construction and materials. After the house was completed, Richard Norelius listed the house for sale in his own name. One month after the decree was entered, Elim Norelius gave a mortgage on the property to secure a $16,000 loan at 8½% interest and then deposited the proceeds in a savings account earning 5½% interest. At the trial, Elim Norelius was unable to explain what he did with $13,600 which he later withdrew from the savings account.

2. Books and records. At the end of 1969, Norelius hired a new bookkeeper to post ledger entries for the period beginning in August, 1969. Norelius instructed him to substitute a new page in the cash receipts journal for the first half of 1969 to falsely show that Elim Norelius paid Richard Norelius for the completion work on the Astoria house. The bookkeeper also changed the explanations for three checks totaling $14,000 to John McGraw in November, 1969, from "contract labor" to "purchases"; and he changed the explanation for checks to Earl Angell for the Astoria house from "accounts payable" to "professional."

Norelius admits that he cannot produce any records to substantiate $67,657.18 of the disbursements of Discount.

3. Money given to John McGraw. John McGraw, an employee of Norelius, received checks from Discount totaling $22,715.37. In addition, McGraw received a kickback of $495 in September, 1969, from a logging company. Most of this money belonged to Richard Norelius. The injunction required Richard Norelius to furnish United Pacific with a list of all his assets, but Richard Norelius did not disclose until September 15, 1970, that McGraw owed him this money. In late September, 1970, United Pacific tried without success to subpoena McGraw for a deposition at Jerry's Motors, a used car lot in Portland managed by Richard Norelius where McGraw lived and worked. The return of service stated: "Checked at Jerry's Motors—No one knew him." Shortly thereafter, McGraw disappeared. Richard Norelius' only explanation for not disclosing earlier the money McGraw owed him was that he knew McGraw no longer had any money.

4. Used car business. In 1970, Norelius worked at Jerry's Motors as general manager; he also had charge of all cash receipts and disbursements. He ran this business without keeping proper books, without reporting to government agencies, without withholding income for taxes from the employees (including himself, his two sons and John McGraw), and without filing quarterly returns on his personal income.

5. Tractor loader. In December, 1969, Norelius furnished United Pacific with a financial statement

which listed a tractor loader worth $8,000 with an unpaid balance of $2,342.29. In a note on the statement, Norelius explained that Ralph Bryant was using the tractor and making the finance payments. In April, 1970, Norelius' then attorney wrote United Pacific that Bryant was leasing the tractor and paying the finance company in lieu of rental. Norelius did not give United Pacific a security interest in the tractor until August, 1970. The security agreement showed an unpaid balance to the finance company as the only outstanding third party interest. At the trial, however, Norelius offered to prove that he and Bryant owned the tractor together under a "loose arrangement"; Norelius also denied having ever told United Pacific that Bryant leased the tractor. Norelius' testimony was contradicted by earlier actions and statements.

The evidence adduced by Discount and the Noreliuses to rebut the evidence of United Pacific was wholly unsatisfactory. The testimony of Richard Norelius was not worthy of belief.

In their pleadings, Discount, Richard Norelius and Phyllis Norelius asserted two affirmative defenses: (1) that the indemnity agreement covered only the Waldo Lake contract; and (2) that United Pacific is estopped by its promise not to take over the contracts if Discount was terminated. The first defense was abandoned at the trial, and the second defense was not proved.

I find that United Pacific is entitled to a judgment

against Discount, Richard Norelius and Phyllis Norelius of $145,777.67, the agreed difference between United Pacific's disbursements and receipts on the contracts. United Pacific is also entitled to reasonable attorneys' fees, and I find that $25,000 is a reasonable amount to allow for attorneys' fees.

United Pacific is entitled to a decree that:

(1) Elim and Agnes Norelius shall pay the First Federal Savings & Loan Association of Clatsop County, Oregon, the balance due on the $16,000 mortgage on the Astoria house.

(2) The Astoria house shall be sold. From the proceeds of the sale Elim and Agnes Norelius shall receive $6,000, and United Pacific shall receive $9,325 to replace Discount funds used to complete the house. United Pacific shall also receive one-half the profits, if any, from the sale, and Earl Angell shall receive the other one-half, less $1,950.69 which he has already received in draws.

(3) Richard Norelius within 30 days from this decree shall specifically list and describe under oath all assets in his possession, custody or control and all assets which he transferred to others since October 13, 1969. Upon 10 days written notice from United Pacific, Richard Norelius shall provide such further information and documents needed by United Pacific to perfect its security interest in these assets.

I further find that Richard Norelius violated the decree of October 13, 1969. If he fails to comply with

the present decree, I will also consider his violations of the earlier decree in fixing appropriate contempt sanctions.

The findings of fact and conclusions of law contained in this opinion and the judgment and decree to be entered on the basis of such findings and conclusions, in my view, will be res adjudicata with respect to a pending action in the state court by Richard Norelius against United Pacific entitled *Discount Corporation, Richard R. Norelius* and *Phyllis Norelius* v. *United Pacific Insurance Company*, No. 363156. For that reason, I denied for the present United Pacific's request that I restrain Richard Norelius from continuing to prosecute that action.

This opinion shall serve as findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). United Pacific shall submit a judgment and decree in accordance with this opinion.

Dated this 30th day of July, 1971.

Gus J. Solomon
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

U.S.A. for use of STANTON W. PAYNE, Plaintiff, v. UNITED PACIFIC INSURANCE COMPANY, a Washington corporation, Defendant and Third-Party Plaintiff, v. DISCOUNT COMPANY, INC., a corporation, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, and EARL ANGELL, Third-Party Defendants.	Civil No. 69-324 STIPULATION FOR ENTRY OF DECREE

IT IS STIPULATED between third party plaintiff and third party defendants Discount Company, Inc., Richard R. Norelius and Phyllis L. Norelius, that a decree be entered herein providing as follows:

1. Based upon the general indemnity agreement dated August 7, 1967, between third-party plaintiff and third-party defendants Discount Co., Inc., Richard R. Norelius, and Phyllis L. Norelius, third-party plaintiff is entitled to the following relief:

2. Said third party defendants be and the same hereby are ordered forthwith to post collateral security with third party plaintiff in the total amount of

$111,500.00 and shall execute all documents as may be necessary to post said collateral security with third party plaintiff.

3. Said third party defendants are hereby ordered to cooperate with third party plaintiff in respect to the completion of the contracts hereinafter mentioned and in connection with the prosecution of all claims which third party plaintiff may determine to make against the government with respect to said contracts.

4. Said third party defendants are hereby enjoined and restrained from transferring or concealing any assets which should be posted with third party plaintiff as provided herein.

5. Said third party defendants shall promptly furnish a full and complete financial statement to third party plaintiff, listing all assets and liabilities with detailed descriptions thereof.

6. Upon application by third party plaintiff awarding third party plaintiff such other and further relief against said third party defendants as it may be entitled to.

/s/ *Paul R. Meyer*
PAUL R. MEYER
Of Attorneys for Defendant and
Third Party Plaintiff

/s/ *William D. Scalf*
WILLIAM D. SCALF
Of Attorneys for Third Party
Defendants Discount Company, Inc.
Richard R. Norelius and Phyllis
L. Norelius

Entry of the decree in accordance with the foregoing stipulation is hereby approved.

DISCOUNT COMPANY, INC.

By */s/ Richard R. Norelius*
RICHARD R. NORELIUS
/s/ Richard R. Norelius
RICHARD R. NORELIUS